



Billing Code – 3270-F3

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

Implementation of the Freedom of Information Act

32 CFR Part 2402

AGENCY: Office of Science and Technology Policy.

ACTION: Final rule.

SUMMARY: The White House Office of Science and Technology Policy (OSTP) issues this final rule to implement the Freedom of Information Act (FOIA), as amended. This final rule implements the requirement of the FOIA by setting forth procedures for requesting access to, and making disclosures of, information contained by OSTP.

This final rule contains provisions to comply with the President's January 21, 2009, Executive Memoranda on "The Freedom of Information Act" and "Transparency and Open Government," and Attorney General Holder's March 19, 2009, Memorandum on "The Freedom of Information Act (FOIA)." In addition, this rule reflects OSTP's policy and practices and reaffirms its commitment to provide the fullest possible disclosure of records to the public.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background:

The Office of Science and Technology Policy (OSTP) is issuing regulations to govern its implementation of the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. FOIA requires Federal agencies, as defined by the Act, to make official documents and other records available to the public upon request, unless the material requested falls under one of several statutorily prescribed exemptions. FOIA also requires agencies to publish rules stating the time, place, fees, and procedures to apply in making records available pursuant to a proper request.

On May 9, 2012 (77 FR 27151), OSTP requested public comments on a proposed rule that would implement the requirements of the FOIA. The proposed rule, among other things, described how information would be made available and the timing and procedures for public requests.

II. This Final Rule and Discussion of Public Comments

The comment period closed on June 11, 2012, and OSTP received two comments. This section of the preamble discusses the issues raised by the commenters.

Section 2402.3 (b)

Commenter # 1

Proposed § 2402.3(b) requires OSTP to publish available records on its e-FOIA Reading Room (“Reading Room”) as well as other documents that, because of the nature of their subject matter, are likely to be the subject of FOIA requests. In addition to the proposed language, Commenter #1 recommends that the Chief FOIA Officer be assigned responsibility of the Reading Room.

OSTP has created a “Reading Room” on its website. This section contains records disclosed in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." *See* 5 U.S.C. 552(a)(2)(D). Furthermore, this section will be updated by the contribution of various staff members, not just the Chief FOIA Officer. To save both time and money, OSTP strongly urges requesters to review documents available at the Reading Room before submitting a FOIA request.

Section 2402.3(c)

Commenter # 1

As proposed, § 2402.3(c) defines the term “search” as referring to “the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.” Commenter #1 suggests that this definition should “explicitly state that ‘search’ shall not include time spent reviewing a record for release.”

FOIA law resolves whether time spent reviewing a record should be included in the “search” definition. Specifically, the current FOIA language found in 5 U.S.C. 552(a)(3)(D)

provides that the term “search” means “to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.” Under this definition, time spent in reviewing a record to determine whether it is responsive material to a FOIA request is implied for the task at hand. Therefore, OSTP does not adopt Commenter # 1’s proposal.

Section 2402.3(c)

Commenter # 2

As proposed, § 2402.3(c) defines the term “representative of the news media” or “news media requester” as any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. For purposes of this definition, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. For “freelance” journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but OSTP shall also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

Commenter # 2 proposes a definition that mirrors FOIA’s language in 5 U.S.C.

552(a)(4)(A)(ii) (as amended by the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524) which provides that the term “representative of the news media” means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ‘news’ means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ‘news’) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

OSTP accepts Commenter # 2’s proposal and hereby adopts the current language found in the FOIA.

Section 2402.4(a)(1)

Commenter # 1

As proposed, § 2402.4(a)(1) provides that, when requesters do not specify the preferred

form or format of the response, OSTP shall produce printed copies of responsive records.

Commenter # 1 suggests that this approach is problematic because “inexperienced requesters do not recognize that they can specify a preferred format.” Moreover, Commenter # 1 notes that “[p]rinted copies are typically more expensive than electronic copies due to the cost of duplication.” Accordingly, he proposes the following definition: “When requesters do not specify the preferred form or format of the response, OSTP shall either inquire of the requester or alternatively produce the records in the least expensive format. OSTP will endeavor to provide electronic/digital copies wherever possible to minimize duplication costs.”

OSTP believes that Commenter # 1’s approach can reduce overhead costs; however, we do not adopt his suggested definition because, based on years of experience in processing FOIA requests, the list of responsive documents may be of such large volume that some e-mail accounts cannot handle the digital file. Additionally, there are many FOIA requesters who do not have access to e-mail or a means of reading an electronic file. Nevertheless, OSTP recognizes that it is useful for requesters to have the option to seek FOIA records in electronic format. Therefore, OSTP will add clear and conspicuous language on its FOIA page informing the public that they can choose an electronic/digital response with their FOIA. If no particular preference is indicated, OSTP will continue to provide printed copies of the responsive records.

Section 2402.8

Commenter # 1

Commenter # 1 suggests the adoption of a threshold amount below which fees are not charged as they would cost more to collect than would be collected. Commenter # 1 suggests the amount of \$15.00 as a threshold fee for OSTP.

OSTP is adopting various provisions which address Commenter # 1's suggestion, *see* § 2402.8. To illustrate, § 2402.8(b)(3) provides that OSTP will not charge duplication fees for the first 100 page of copies unless the copies are requested for a commercial use. Similarly, OSTP will not charge a fee provided that the FOIA record being sought is "easily identifiable" as provided by § 2402.8(b)(1)(A). OSTP believes that the provisions mentioned above, and the others provided by § 2402.8, serve the same purpose as Commenter # 1's suggestion; therefore, OSTP does not find it necessary to adopt a threshold fee.

Section 2402.8(b)(3)

Commenter # 1

As proposed, the duplication fee for photocopied records is \$0.15 per page. Commenter # 1 is concerned that this fee may be too high, which may, in turn, discourage FOIA requests from the public. Instead, he suggests a fee of \$0.10 per page.

OSTP hereby adopts a duplication fee of \$0.10, which is consistent with Department of Justice guidelines.

Section 2402.9(c)

Commenter # 1

Commenter # 1 argues that the proposed rules "incorporate a new standard that is not found in the law" regarding fee waivers. Specifically, Commenter # 1 cites to the second sentence in proposed subsection § 2402.9(c) that provides "[i]n exceptional cases, however, a partial waiver may be granted if the request for records would impose an exceptional burden or require an exceptional expenditure of OSTP resources."

OSTP finds that the standard for fee waivers is properly stated by § 2402.9(a), which provides that “OSTP shall waive part or all of the fees” if two conditions are met: (1) disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations of activities of the government; and (2) disclosure is not primarily in the commercial interest of the requester. This provision mirrors the current legal standard found in the FOIA, *see* 5 U.S.C. 552(a)(4)(A)(iii).

OSTP understands Commenter # 1’s concern to be that OSTP would charge a partial fee to a FOIA requester under § 2402.9(c) even when the requester meets the conditions for a waiver under § 2402.9(a); however, the first part of § 2402.9(c) states that “[i]f the two conditions in paragraph (a) of this section are met, OSTP will ordinarily waive all fees.” OSTP thus finds that the standard we are proposing adheres to the FOIA. When a requester meets the standard under § 2402.9(a), OSTP’s general policy is to waive all fees. Nevertheless, for the sake of clarity, OSTP will modify the second part of § 2402.9(c) to apply only if the requester does not meet the conditions stated in § 2402.9(a).

Section 2402.9(d)

Commenter # 1

Commenter # 1 notes that the proposed rules do not define “exceptional circumstances” for purposes of failure to comply with statutory time limits but provides no further comment. OSTP takes no further action regarding this subsection.

Consultation with the National Archives and Records Administration

The National Archives and Records Administration's Office of Government Information Services (OGIS) reviewed OSTP's draft regulations and made recommendations, which OSTP took into account in drafting this final rule.

III. Statutory and Executive Order Reviews

Executive Order 12866

These regulations have been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, Section 1(b), Principles of Regulation. These regulations are not a significant regulatory action under Section 3(f) of Executive Order 12866.

Paperwork Reduction Act

OSTP has determined that the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq., does not apply because these regulations do not contain any information collection requirements subject to approval by OMB.

Executive Order 12988

These regulations meet the applicable standards set forth in Executive Order 12988, Civil Justice Reform.

Executive Order 13132

These regulations will not have substantial direct effects on the States, on the relationship

between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, OSTP has determined that these regulations do not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Regulatory Flexibility Act

OSTP, in accordance with the Regulatory Flexibility Act, 5 U.S.C. § 605(b), has reviewed these proposed regulations and certifies that they will not have a significant economic impact on a substantial number of small entities because they pertain to administrative matters affecting the agency.

Unfunded Mandates Reform Act of 1995

These regulations will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, et seq.

Small Business Regulatory Enforcement Fairness Act of 1996

These regulations are not major regulations as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. They will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability

of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

National Environmental Policy Act of 1969

OSTP has reviewed this action for purposes of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321-4347, and has determined that this action will not have a significant effect on the human environment.

List of Subjects in 32 CFR Part 2402

Classified information.

Therefore, according to the reasons stated in the preamble, the Office of Science and Technology Policy adds 32 CFR Part 2402 to read as follows:

PART 2402—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT
Sec.

2402.1 Purpose and scope.

2402.2 Delegation of authority and responsibilities.

2402.3 General policy and definitions.

2402.4 Procedure for requesting records.

2402.5 Responses to requests.

2402.6 Business information.

2402.7 Appeal of denials.

2402.8 Fees.

2402.9 Waiver of fees.

2402.10 Maintenance of statistics.

2402.11 Disclaimer.

Authority: 5 U.S.C. 552; E.O. 13392, 70 FR 75373 (Dec. 14, 2005).

§ 2402.1 Purpose and scope.

The regulations in this part prescribe procedures to obtain information and records from the Office of Science and Technology Policy (OSTP) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The regulations in this part apply only to records that are:

- (a) Either created or obtained by OSTP; and
- (b) Under OSTP control at the time of the FOIA request.

§ 2402.2 Delegation of authority and responsibilities.

(a) The Director of the Office of Science and Technology Policy designates the OSTP General Counsel as the Chief FOIA Officer, and hereby delegates to the Chief FOIA Officer the authority to act upon all requests for agency records and to re-delegate such authority at his or her discretion.

(b) The Chief FOIA Officer shall designate a FOIA Public Liaison, who shall serve as the supervisory official to whom a FOIA requester can raise concerns about the service the FOIA requester has received following an initial response. The FOIA Public Liaison will be listed on the OSTP website (<http://www.whitehouse.gov/administration/eop/ostp>) and may re-delegate the FOIA Public Liaison's authority at his or her discretion.

(c) The Director establishes a FOIA Requester Service Center that shall be staffed by the Chief FOIA Officer and the FOIA Public Liaison. The contact information for the FOIA Requester

Service Center is Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Ave, NW, Washington, DC 20504; Telephone: (202) 456-4444 Fax: (202) 456-6021; Email: ostpfoia@ostp.eop.gov. Updates to this contact information will be made on the OSTP website.

§ 2402.3 General policy and definitions.

(a) Non-exempt records available to public. Except for records exempt from disclosure by 5 U.S.C. 552(b) or published in the Federal Register under 5 U.S.C. 552(a)(1), agency records of OSTP subject to FOIA are available to any person who requests them in accordance with these regulations.

(b) Record availability at the OSTP e-FOIA Reading Room. OSTP shall make records available on its website in accordance with 5 U.S.C. 552(a)(2), as amended, and other documents that, because of the nature of their subject matter, are likely to be the subject of FOIA requests. To save both time and money, OSTP strongly urges requesters to review documents available at the OSTP e-FOIA Reading Room before submitting a request.

(c) Definitions. For purposes of this part:

(1) All of the terms defined in the Freedom of Information Act, and the definitions included in the "Uniform Freedom of Information Act Fee Schedule and Guidelines" issued by the Office of Management and Budget apply, unless otherwise defined in this subpart.

(2) The term “commercial use request” means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. OSTP shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears

that the requester will put the records to a commercial use, either because of the nature of the request itself or because OSTP has reasonable cause to doubt a requester's stated use, OSTP shall provide the requester a reasonable opportunity to submit further clarification.

(3) The terms "disclose" or "disclosure" refer to making records available, upon request, for examination and copying, or furnishing a copy of records.

(4) The term "duplication" means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (for example, magnetic tape or disk), among others.

(5) The term "educational institution" means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(6) The term "fee waiver" means the waiver or reduction of processing fees if a requester can demonstrate that certain statutory standards are satisfied.

(7) The term "FOIA Public Liaison" means an agency official who is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(8) The term "noncommercial scientific institution" means an institution that is not operated on a "commercial" basis, as that term is defined in these regulations, and that is operated solely for

the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

(9) The term “perfected request” means a FOIA request for records that adequately describes the records sought, that has been received by OSTP, and for which there is no remaining question about the payment of applicable fees.

(10) The terms “representative of the news media” or “news media requester” mean any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ‘news’) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(11) The term “search” refers to the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

(12) The term “working day” means a regular Federal working day. It does not include Saturdays, Sundays, or legal Federal holidays.

§ 2402.4 Procedure for requesting records.

(a) Format of requests. (1) In general. Requests for information must be made in writing and may be delivered by mail, fax, or electronic mail, as specified in § 2402.2(c). All requests must be made in English. Requests for information must specify the preferred form or format (including electronic formats) of the response. When requesters do not specify the preferred form or format of the response, OSTP shall produce printed copies of responsive records.

(2) Electronic format records. (i) OSTP shall provide the responsive record or records in the form or format requested if the record or records are readily reproducible by OSTP in that form or format. OSTP shall make reasonable efforts to maintain its records in forms or formats that are reproducible for the purpose of disclosure. For purposes of this paragraph, the term readily reproducible means, with respect to electronic format, a record or records that can be downloaded or transferred intact to a floppy disk, computer disk (CD), tape, or other electronic medium using equipment currently in use by the office or offices processing the request. Even though some records may initially be readily reproducible, the need to segregate exempt from nonexempt records may cause the releasable material to be not readily reproducible.

(ii) In responding to a request for records, OSTP shall make reasonable efforts to search for the

records in electronic form or format, except where such efforts would significantly interfere with the operation of the agency's automated information system(s). For purposes of this paragraph, the term “search” means to locate, manually or by automated means, agency records for the purpose of identifying those records that are responsive to a request.

(iii) Searches for records maintained in electronic form or format may require the application of codes, queries, or other minor forms of programming to retrieve the requested records.

(b) Contents. A request must describe the records sought in sufficient detail to enable OSTP personnel to locate the records with a reasonable amount of effort. OSTP will regard a request for a specific category of records as fulfilling the requirements of this paragraph if it enables responsive records to be identified by a technique or process that is not unreasonably burdensome or disruptive to OSTP operations. Whenever possible, a request should include specific information about each record sought, such as the date, number, title or name, author, recipient, and subject matter of the record. If OSTP determines that a request does not reasonably describe the records sought, it will either provide notice of any additional information needed or otherwise state why the request is insufficient. OSTP will offer a requester reasonable opportunity to reformulate the request so that it meets the requirements of this section.

(c) Date of receipt. A request that complies with paragraphs (a) and (b) of this section is deemed a “perfected request.” A perfected request is deemed received on the actual date it is received by OSTP. A request that does not comply with paragraphs (a) and (b) of this section is deemed received when sufficient information to perfect the request is actually received by OSTP. For requests that are expected to result in fees exceeding \$250, the request shall not be deemed to have been received until OSTP has received full payment or satisfactory assurance of full payment as provided under § 2402.8.

§ 2402.5 Responses to requests.

(a) Responses within 20 working days. OSTP will exercise all reasonable efforts to acknowledge, grant, partially grant, or deny a request for records within 20 working days after receiving a perfected request.

(b) Extensions of response time in “unusual circumstances.” In circumstances where a determination as provided in paragraph (a) of this section is not possible within 20 working days, OSTP may extend the time limit prescribed in paragraph (a) of this section as necessary to adequately respond to a request. OSTP shall notify the requester of the extension, the reasons for the extension, and the date on which a determination is expected. In such instances, the requester will be provided an opportunity to limit the scope of the request so that it may be processed within the time limit, or to agree to a reasonable alternative time frame for processing. Circumstances justifying a time limit extension as provided in this paragraph (b) include, but are not limited to, requests that require OSTP to:

- (1) Search for and collect the requested records from off-site storage facilities;
- (2) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request;
- (3) Consult, with all practicable speed, with another agency having a substantial interest in the determination of the request; or
- (4) Perform searches of records of former employees.

(c) Two-track processing. To ensure the most equitable treatment possible for all requesters, OSTP will process requests on a first-in, first-out basis, using a two-track processing system based upon the estimated time it will take to process the request.

(1) Simple requests. the first track is for requests of simple to moderate complexity that are expected to be completed within 20 working days. A requester whose request does not qualify as a simple request may be given an opportunity to limit the scope of his or her request in order to qualify for faster processing.

(2) Complex requests. the second track is for requests involving “unusual circumstances,” as described in paragraph (b) of this section, that are expected to take more than 20 working days to complete.

(d) Expedited processing. (1) Expedited requests: OSTP may take requests out of order and expedite the processing of a request upon receipt of a written statement that clearly demonstrates a compelling need for expedited processing. Requesters must provide detailed explanations to support their expedited requests. For purposes of determining expedited processing, the term compelling need means:

(i) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of any individual; or

(ii) That a request is made by a person primarily engaged in disseminating information, and the person establishes that there is an urgency to inform the public concerning actual or alleged Federal Government activity.

(2) A person requesting expedited processing must include a statement certifying that the compelling need provided is true to the best of the requester’s knowledge and belief.

(3) OSTP may grant or deny a request for expedited processing as a matter of agency discretion.

A determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 working days after receipt of the perfected request.

(e) Content of denial. When OSTP denies a request for records, either in whole or in part, the written notice of the denial shall state the reason for denial, and cite the applicable statutory exemption(s), unless doing so would harm an interest protected by the exemption(s) under which the request was denied, and notify the requester of the right to appeal the determination as specified in § 2402.7. The requester's failure to make advance payment or to give a satisfactory assurance of full payment required under § 2402.8 may be treated as a denial of the request and appealed under § 2402.7.

(f) Identifying responsive records. In determining which records are responsive to a request, OSTP ordinarily will include only records in its possession as of the date the component begins its search for them.

(g) Consultations and referrals. When OSTP receives a request for a record in its possession, it shall determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under FOIA and, if so, whether it should be disclosed as a matter of administrative discretion. If the receiving component determines that it is best able to process the record in response to the request, then it shall do so. If the receiving component determines that it is not best able to process the record, then it shall either:

- (1) Respond to the request regarding that record after consulting with the agency best able to determine whether to disclose it and with any other agency that has a substantial interest in it; or
- (2) Refer the responsibility for responding to the request regarding that record to the agency best able to determine whether to disclose it, or to another agency that originated the record (but only if that agency is subject to the FOIA). Ordinarily, the agency that originated a record will be presumed to be best able to determine whether to disclose it. OSTP shall notify the FOIA

requester in writing that a referral of records has been made, provide the name of the agency to which the referral was directed, and include that agency's FOIA contact information.

(h) Redactions. For redactions within disclosed records, OSTP shall:

- (1) Indicate the FOIA exemption under which a redaction is made, unless including that exemption would harm an interest protected by the exemption; and
- (2) Indicate, if technically feasible and reasonable, the amount of information deleted and the exemption under which the deletion is made at the place in the record where the deletion is made.

§ 2402.6 Business information.

(a) In general. Business information obtained by OSTP from a submitter will be disclosed under FOIA only under this section.

(b) Definitions. For purposes of this section:

(1) Business information means commercial or financial information obtained by OSTP from a submitter that may be protected from disclosure under Exemption 4 of FOIA.

(2) Submitter means any person or entity from whom OSTP obtains business information, directly or indirectly. The term includes corporations; state, local, and tribal governments; and foreign governments.

(c) Designation of business information. A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten years after the date of the submission

unless the submitter requests, and provides justification for, a longer designation period.

(d) Notice to submitters. OSTP shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information. The notice shall either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish it.

(e) Where notice is required. Notice shall be given to a submitter wherever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(2) OSTP has reason to believe that the information may be protected from disclosure under Exemption 4.

(f) Opportunity to object to disclosure. OSTP will allow a submitter a reasonable time to respond to the notice described in paragraph (d) of this section and will specify that time period within the notice. If a submitter has any objection to disclosure, the submitter is required to provide a detailed written statement of objections. The statement must specify all grounds for withholding any portion of the information under any exemption of FOIA and, in the case of Exemption 4, the submitter must show why the information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified, the submitter will be considered to have no objection to disclosure of the information. Information provided by the submitter that OSTP does not receive within the time specified shall not be considered by OSTP. Information

provided by a submitter under this paragraph may itself be subject to disclosure under FOIA.

(g) Notice of intent to disclose. OSTP shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever OSTP decides to disclose business information over the objection of a submitter, OSTP shall give the submitter written notice, which shall include:

(1) A statement of the reason(s) why each of the submitter's disclosure objections was not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) Exceptions to notice requirements. The notice requirements of paragraphs (d) and (g) of this section shall not apply if:

(1) OSTP determines that the information should not be disclosed;

(2) The information lawfully has been published or has been officially made available to the public;

(3) Disclosure of the information is required by statute (other than FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous -- except that, in such a case, OSTP shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(i) Notice of FOIA lawsuit. Whenever a requester files a lawsuit seeking to compel the disclosure of business information, OSTP shall promptly notify the submitter.

(j) Corresponding notice to requesters. Whenever OSTP provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, OSTP shall also notify the requester(s). Whenever OSTP notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, OSTP shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, OSTP shall notify the requester(s).

§ 2402.7 Appeal of denials.

(a) A denial of a request for records, either in whole or in part, may be appealed in writing to the Chief FOIA Officer within 30 working days of the date of the letter denying an initial request.

(b) Appeals may be sent via email to ostpfoia@ostp.eop.gov or by mail to: Chief FOIA Officer, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Ave, NW, Washington, DC 20504. Updates to this contact information will be made on the OSTP website. The appeal letter should specify the internal control number assigned to the FOIA request by OSTP in its response, the records requested, and the basis for the appeal.

(c) The Chief FOIA Officer shall make a determination on the appeal under 5 U.S.C. 552(a)(6)(A)(ii) within 20 working days after the receipt of the appeal. If the denial is wholly or partially upheld, the Chief FOIA Officer shall:

(1) Notify the requester that judicial review is available pursuant to 5 U.S.C. 552(a)(4)(B)-(G); and

(2) Notify the requester that the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-

exclusive alternative to litigation. OGIS' contact information is: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740, E-mail: ogis@nara.gov, Telephone: 202-741-5770, Facsimile: 202-741-5769, Toll-free: 1-877-684-6448.

(d) If OGIS' services are requested, OSTP will work with OGIS and the FOIA requester to resolve any dispute as a non-exclusive alternative to litigation.

§ 2402.8 Fees.

(a) Fees generally required. OSTP shall use the most efficient and least costly methods to comply with requests for documents made under FOIA. OSTP shall charge fees in accordance with paragraph (b) of this section unless fees are waived in accordance with § 2402.9.

(b) Calculation of fees. In general, fees for searching, reviewing, and duplication will be based on the direct costs of these services, including the average hourly salary (base plus locality payment plus 16 percent) for the employee(s) making the search.

(1) Search fee. Search fees may be charged even if responsive documents are not located or if they are located but withheld on the basis of an exemption. However, search fees shall be limited or not charged as follows:

(i) Easily identifiable records. Search fees shall not be charged for records that are identified by the requester by title of the record and name of the person possessing the record

(ii) Educational, scientific or news media requests. No search fee shall be charged if the request is not sought for a commercial use and is made by an educational or scientific institution, whose purpose is scholarly or scientific research, or by a representative of the news media.

(iii) Other non-commercial requests. No search fee shall be charged for the first two hours of searching if the request is not for a commercial use but is not by an educational or scientific institution, or a representative of the news media.

(iv) Requests for records about self. No search fee shall be charged to search for records performed under the terms of the Privacy Act, 5 U.S.C. 552a(f)(5).

(2) Review fee. A review fee shall be charged only for commercial requests. A review fee shall be charged for the initial examination of documents located in response to a request to determine the documents may be withheld from disclosure and for the redaction of document portions exempt from disclosure. Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review are also assessable.

(3) Duplication fee. Records will be photocopied at a rate of \$0.10 per page. For other methods of reproduction or duplication, OSTP will charge the actual direct costs of producing the document(s). Duplication fees shall not be charged for the first 100 pages of copies unless the copies are requested for a commercial use.

(c) Aggregation of requests. When OSTP determines that a requester, or a group of requesters acting in concert, is attempting to evade the assessment of fees by submitting multiple requests in the place of a single more complex request, OSTP may aggregate any such requests and charge accordingly.

(d) Fees likely to exceed \$25. If the total fee charges are likely to exceed \$25, OSTP shall notify the requester of the estimated amount of the charges. The estimate shall include a breakdown of the fees for search, review, and/or duplication. The notification shall offer the requester an

opportunity to confer with the FOIA Public Liaison to reformulate the request to meet the requester's needs at a lower cost.

(e) Advance payments. Advance payment of fees will generally not be required. If, however, charges are likely to exceed \$250, OSTP shall notify the requester of the likely cost and:

(1) Obtain satisfactory assurance of full payment; or

(2) Regardless of when a FOIA request becomes perfected under § 2402.4(c), if the requester has no history of payment or has failed to pay a fee within 30 days of the date of billing, OSTP may require the requester to pay the full amount of any fees owed and/or to make an advance payment of the full amount of the estimated charges before OSTP begins to process the new request or a pending request from that requester. In this case, OSTP's working days to process the request as described in § 2402.5 will not begin to run until the date OSTP receives the full amount of any fees owed and/or the advance payment of the full amount of the estimated charges.

(f) Other charges. OSTP will recover the full costs of providing services such as those enumerated below when it elects to provide them:

(1) Certifying that records are true copies;

(2) Sending records by special methods such as express mail.

(g) Remittances. Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the Treasury of the United States and mailed to the Chief FOIA Officer, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Ave, NW, Washington, DC 20504. Updates to this contact information will be made on the OSTP website.

(h) Receipts and refunds. A receipt for fees paid will be given upon request. A refund of fees paid for services actually rendered will not be made.

§ 2402.9 Waiver of fees.

(a) In general. OSTP shall waive part or all of the fees assessed under § 2402.8 if the following conditions are satisfied:

- (1) Disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and
- (2) Disclosure is not primarily in the commercial interest of the requester.

(b) Clarification. Where OSTP has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, OSTP may seek clarification from the requester before assigning the request to a specific category for fee assessment purposes.

(c) Partial waiver of fees. If the two conditions stated in paragraph (a) of this section are met, OSTP will ordinarily waive all fees. In exceptional cases and provided that the requester does not meet the conditions stated in paragraph(a), however, a partial waiver may be granted if the request for records would impose an exceptional burden on OSTP or require an exceptional expenditure of OSTP resources.

(d) Failure to comply. OSTP will not assess fees under § 2402.8 if the Agency fails to comply with any time limit and no exceptional circumstances apply to processing the request.

(e) Waivers. OSTP may waive fees in other circumstances solely at its discretion, consistent with 5 U.S.C. 552 and the Fee Waiver Policy Guidance issued by the Department of Justice.

§ 2402.10 Maintenance of statistics.

(a) OSTP shall maintain records that are sufficient to allow accurate reporting of FOIA processing statistics, as required under 5 U.S.C. 552 and all guidelines for the preparation of annual FOIA reports issued by the Department of Justice.

(b) OSTP shall annually, on or before February 1 of each year, prepare and submit to the Attorney General an annual report compiling the statistics maintained in accordance with paragraph (a) of this section for the previous fiscal year. A copy of the report will be available for public inspection at the OSTP website.

§ 2402.11 Disclaimer.

Nothing in this part shall be construed to entitle any person, as a right, to any service or to the disclosure of any record to which such person is not entitled under FOIA.

Ted Wackler, Deputy Chief of Staff and Assistant Director